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ABSTRACT

The issue of qualifications for tenure is examined with attention to judicial tests for qualification in lawsuits in which faculty alleged that negative tenure decisions were infected with illegal discrimination. The focus is the degree to which a faculty plaintiff must demonstrate at the first stage of the lawsuit that he or she was qualified for tenure using subjective determinations of relevant factors in the decision-making process, or whether the plaintiff need only show that he or she met the minimum qualifications for a tenured faculty member. It is noted that the approach chosen by a particular court may determine whether or not a plaintiff can make out a successful prima facie case of employment discrimination. A database search was conducted of all federal court decisions published between 1972 and June 1987. Over 300 cases involving faculty challenges to tenure or promotion under federal antidiscrimination laws were analyzed. Of these cases, about 5% addressed explicitly the issue of how the plaintiff was to persuade the trial judge that he or she was "qualified" for tenure. The remaining court opinions did not address the issue of whether the subjective or the objective test for qualification should be used. Thirty references are included. (SW)

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QUALIFICATIONS FOR TENURE: THE LEGAL DEFINITIONS

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This paper was presented at the annual meeting of the Association for the Study of Higher Education held at the Sheraton Inner Harbor Hotel in Baltimore, Maryland, November 21-24, 1987. This paper was reviewed by ASHE and was judged to be of high quality and of interest to others concerned with the research of higher education. It has therefore been selected to be included in the ERIC collection of ASHE conference papers.

QUALIFICATIONS FOR TENURE: THE LEGAL DEFINITIONS

One of the most important norms of the academy is the right, and the unique ability, of faculty members to determine whether or not their colleagues are qualified for promotion or tenure (Caplow and McGee, 1958). The right of the academy to determine for itself, without outside interference, "who shall teach" has been protected by the U.S. Supreme Court (Sweezy v. New Hampshire, 1957). Furthermore, the significance of a tenure decision to the future of an academic department and to the commitment of an institution's resources over several decades underscores the importance of establishing the qualifications desired of tenured faculty and then determining whether a particular candidate, in fact, possesses those qualifications.

Despite general agreement within the academic community as to the significance of the tenure decision and the relevance of the "trinity" of qualifications generally required (scholarship, teaching ability and service), conceptions of the kind and quality of performance necessary to be judged "qualified" differ among institutions, between departments within the same institution, and even, not infrequently, among colleagues within the same department. Subjective determinations must be made as to the level of performance necessary and whether a particular candidate has met that performance level. This subjectivity, and the varying interpretations of "qualification" among and within academic departments, frequently make it difficult for college administrators to explain to faculty the reasons for a tenure

denial, and to explain and defend those reasons when the negative decision is challenged in court.

This paper examines the issue of qualifications for tenure by examining judicial tests for qualification in lawsuits in which faculty alleged that negative tenure decisions were infected with illegal discrimination. This special category of lawsuits was selected because, in other challenges to tenure denials (such as allegations of academic freedom/free speech violations, contractual breaches, etc.), the courts typically have not examined the substance of the tenure decision, but rather have addressed the sufficiency of the procedure by which the decision was made (Lee and Olswang, 1985). In discrimination cases, however, judges review the reasons for the negative decision because the faculty member is asserting that such reasons do not support the negative decision, and thus are a pretext for illegal discrimination.

The specific issue addressed by this paper is the degree to which a faculty plaintiff must demonstrate at the first stage of the lawsuit (the "prima facie case") that he or she was qualified for tenure using subjective determinations of relevant actors in the decision-making process, or whether the plaintiff need only show that he or she met the minimum qualifications for a tenured faculty member. This issue is significant because there is little uniformity in judicial approach to this issue, and because the approach chosen by a particular court may, in fact, determine whether or not a plaintiff can make out a successful prima facie case of employment discrimination.[1]

These issues are also significant to faculty leaders and academic administrators who are concerned with effectiveness as well as the equity of employment decisions made regarding college faculty. Analysis of the cases suggests approaches that would help institutions make fairer, more rational and better documented decisions, an outcome that should result in less litigation by as well as heightened professional development for junior faculty.

Analytical Framework

Discrimination cases are litigated within a framework created for caes brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), and first articulated by the U.S. Supreme Court in McDonnell-Douglas Corp. v. Green (1973).[2] The plaintiff must first present a prima facie case which establishes that it is at least plausible that a negative decision resulted from discrimination and not from a lack of qualification on the plaintiff's part. The plaintiff must satisfy a four-part test:

1. The plaintiff is a member of a class protected by Title VII (or the relevant law under which the plaintiff is suing);
2. The plaintiff was eligible for and qualified for promotion, tenure, etc. (emphasis added);
3. Though qualified, the plaintiff did not receive the promotion, tenure, etc.; and
4. The college tenured or promoted individuals possessing

similar qualifications at approximately the same time (Smith v. University of North Carolina, 1980, interpreting McDonnell-Douglas for academe)

If the judge rules that the plaintiff has established a prima facie case of discrimination, the burden shifts to the defendant[3] college to "articulate a legitimate, non-discriminatory reason" for the negative decision (Texas Department of Community Affairs v. Burdine, 1981). After the reason is articulated by the college, the burden shifts back to the plaintiff to prove that the reason given by the defendant is a pretext, and that discrimination is the actual reason for the negative decision.

The plaintiff's ability to establish a prima facie case of discrimination is critical, for if the judge rules that the plaintiff has not made such a case, the lawsuit ends and the defendant prevails, often without having had to present its reasons for the negative decision. The issue of "qualification", then, is a critical one for plaintiffs, as it is the only one of the four steps of the prima facie case which is open to interpretation as to what a plaintiff must prove in order to demonstrate that he or she was "qualified" for tenure.

The courts have taken one of three approaches to determining whether or not a plaintiff is sufficiently qualified to establish a prima facie case and thus shift the burden to the defendant college. In many cases, trial and appellate judges did not address explicitly the manner in which they determined that the the plaintiff was qualified, but ruled summarily that the plaintiff had successfully made out a prima facie case of

discrimination (Gutzwiller v. Fenik, 1986; Farlow v. University of North Carolina, 1985). Those courts that have addressed the issue of qualification have taken two approaches. Courts in earlier cases used an **objective** standard, asserting that if the plaintiff could demonstrate that he or she met the minimum qualifications for tenure (number of years employed at the institution and some level of activity in each of the three categories of teaching, research, and service), then the plaintiff was presumptively "qualified" for tenure. Other courts, however, have required the plaintiff to prove that he or she was **subjectively** qualified for tenure, meaning that the plaintiff must demonstrate that peers, outside evaluators, or other significant sources had established that the quality of the faculty member's performance was sufficient to merit tenure. In many cases, this is precisely the issue that the plaintiff cannot prove because the negative decision was based on an allegedly unfair and biased assessment of the plaintiff's performance, due to what the plaintiff views as the discriminatory motives of his or her peers, the college administration, or external evaluators.

The debate over whether plaintiffs should only need to prove minimum qualifications (the "objective" approach) or that they are either better qualified than others who received tenure (the "relative qualifications" approach) or subjectively qualified has been addressed in the nonacademic arena. Commentators have criticized the courts that have insisted on proof of relative qualification, asserting that neither the legislative history of Title VII nor pronouncements by the U.S. Supreme Court justify

holding plaintiffs to such a difficult standard at the prima facie case stage (Wikman, 1984; Shudofsky, 1982). The Supreme Court has avoided addressing this specific issue, but has not yet required plaintiffs to prove relative qualification at the prima facie case stage.[4] An analysis of recent decisions by courts addressing alleged discrimination in academe suggests that academic plaintiffs are being held to a higher standard than plaintiffs suing business organizations.

Methodology and Data Sources

A computerized search of the database of all federal court decisions published between 1972 (when Title VII first applied to higher education institutions) and June, 1987 was done. Over three hundred cases involving faculty challenges to tenure or promotion under federal anti-discrimination laws were retrieved, read, and categorized. Of that body of cases, approximately five percent addressed explicitly the issue of how the plaintff was to persuade the trial judge that he or she was "qualified" for tenure. The remaining court opinions did not address the issue of whether the subjective or the objective test for qualification should be used, but generally ruled without comment that the plaintiff had successfully made a prima facie case (although plaintiffs have been overwhelmingly unsuccessful in prevailing at the second and third steps of the case). However, cases litigated since 1980 were much more heavily represented within the five percent, suggesting that the issue of subjective/objective qualification has increased in importance

over the last several years.

"Objective" Qualification

Courts that require that the plaintiff demonstrate only objective qualification for tenure (length of service, some evidence of activity for each of the three cateories of teaching, research and service) tend to view employment decisions in academe very differently from those courts that require proof of subjective qualification. Judges in this first category tend to believe that Congress intended Title VII to apply to academe in the same way that it applies to other kinds of organizations, and tend not to hold academics to higher standards of performance (or institutions to lower standards of proof) simply because the issue is tenure, rather than a promotion, a raise, or some other decision.[5] Furthermore, these courts have argued that the issue of whether the plaintiff was subjectively qualified is more appropriately addressed during the defendant college's rebuttal stage, because the college has access to evaluations of the plaintiff's performance, information that the plaintiff may not have. In fact, plaintiffs frequently must seek a court order to obtain confidential evaluations of their performance, as well as the personnel files of other faculty with whom they wish to compare themselves. In some cases, defendant colleges have refused to disclose this information (DeLano, 1987; Lee, 1982-83), suggesting that requiring that plaintiffs demonstrate subjective qualification at the prima facie case stage, while at the same time denying access to evaluations of the plaintiff's

performance, would virtually assure that plaintiffs would be unable to make a prima facie case.

Another argument used by courts that require only objective qualification is that the intent of the U.S. Supreme Court, in establishing the order of proof for Title VII cases, was that making out a prima facie case should not be "onerous" (Texas Department of Community Affairs v. Burdine, 1981, p. 253). Requiring a plaintiff to demonstrate at the prima facie step that he or she was subjectively qualified for tenure

> collapse[s] the three step analysis into a single initial step at which all issues would be resolved. This would defeat the purpose underlying the McDonnell-Douglas process (Lynn v. Regents of the University of California, 1981, p. 1344)

and would, in most instances, make it impossible for a plaintiff to succeed at the prima facie stage, for absence of subjective qualification is, of course, the defense raised by the college or university.

A few courts have not been comfortable importing the objective qualification approach wholesale from the business context to academe. They have argued that, because of the lifetime nature of the tenure decision, something more than "mere qualification" is needed at the prima facie stage, and that some "additional element" must be raised by the plaintiff as evidence of discrimination. For example, the trial judge in Kunda v. Muhlenberg College (1978) made this argument, as did the trial judge in Johnson v. Michigan State University (1982), who ruled

that serious procedural irregularities, combined with objective evidence of qualification, were sufficient for success at the prima facie case stage. However, this higher standard was criticized by the Third Circuit in Kunda v. Muhlenberg College (1980), and the "objective qualification plus procedural violation" requirement has given way to the "subjective qualification" theory used by several federal appellate courts in recent cases.

Subjective Qualification

The rationale for requiring plaintiffs to demonstrate subjective qualification is based squarely on the special nature of the tenure decision, and its uniqueness to academe. A strong articulation of the basis for heightened proof requirements for faculty plaintiffs was provided by Second Circuit Judge Henry J. Friendly in Lieberman v. Gant (1980).[6] In comparing the nature of the tenure decision to employment decisions made about blue collar workers, Judge Friendly wrote:

> In contrast to an ordinary teaching position, terminable at the end of any academic year, and in still greater contrast to employment as a bricklayer . . . advancement to tenure entails what is close to a life-long commitment by a university, and therefore requires much more than the showing of performance 'of sufficient quality to merit continued employment' [the standard used in a discrimination case involving a blue-collar employee]. . . The policies of the University of Connecticut . . .

> prescribe qualifications for tenure that are considerably higher than those for the making or renewal of an appointment. . . a candidate for tenure does not make out the elements needed for a prima facie case merely by showing qualifications for continuation as an untenured faculty member . . . (p. 64)

Friendly's rationale for requiring a heightened proof of qualification has been quoted by numerous trial and appellate judges in academic discrimination cases.

The First Circuit erected an even more difficult hurdle for an academic plaintiff, resulting in his inability to establish a prima facie case of national origin discrimination. In Kumar v. Board of Trustees, University of Massachusetts (1985), the chancellor had denied Kumar tenure because of his perceived inadequacy in teaching, research, and service. Although the trial judge had ruled that Kumar had successfully made out a prima facie case based on objective qualification, the appellate court disagreed. The qualifications for tenure, wrote appellate judge Coffin, were the published university standards for tenure, which required a finding of "convincing evidence of excellence in at least two, and strength in the third, of the areas of teaching; of research . . .; and of service" (p. 9). In other words, the university's tenure qualifications themselves were subjective, and thus required the plaintiff to show that he had been found excellent in two categories and strong in the third, which he, of course, was unable to do; this inability serving as the basis for his discrimination complaint. Judge Coffin

criticized the trial judge's ruling, stating:

> the district court . . . treated Title VII . . . as though it were an affirmative action statute . . . [T]his overlooks the difference between the selection of a craftsman and of a professional. A bricklayer who can properly lay a specified number of bricks in a specified period is ordinarily as good as any other bricklayer likely to appear. But in the selection of a professor, judge, lawyer, doctor, or Indian chief, while there may be appropriate minimum standards, the selector has a right to seek distinction beyond the minimum indispensible qualities. (pp. 10-11)

The judge did not distinguish between the use of "minimum standards" to establish a rebuttable presumption of discrimination and the ability of the university, during its rebuttal, to demonstrate that the plaintiff did not attain the distinction required by the University of its tenure candidates.

Other judges have applied the subjective test without discussing its relationship to the "special nature" of tenure. For example, in Sobel v. University of Maryland (1985), the appellate court stated that, because the plaintiff had not successfully rebutted the university president's finding that she was not qualified for promotion, she had not made out a prima facie case. Again, this approach is contrary to that used in litigation against nonacademic defendants, where the plaintiff's rebuttal of the defendant's "nondiscriminatory reason" comes at the final state of the litigation, long after the prima facie case has been made by objective evidence.

Commentators have noted the propensity of federal courts to defer to the subjective judgments of evaluators when managerial or professional employees challenge negative employment decisions as discriminatory (Bartholet, 1982; Waintroob, 1979-80). Although created in a case involving a claim by blue-collar employees, the McDonnell-Douglas formulation is not limited to those jobs in which objective qualifications are appropriate; it is a process of presenting proof rather than a formula for determining whether discrimination occurred. Furthermore, despite judicial deference to subjective judgments about the qualifications of managers and professionals, the courts have not required evidence of subjective qualification at the prima facie case stage for litigation involving nonacademic organizations. When one considers the great difficulty which plaintiffs face in proving their claims of discrimination,[7] it is not clear why some federal judges have applied stricter standards for qualification in prima facie cases to academic plaintiffs. It is unlikely that using the objective qualification approach would result in a sizable difference in plaintiffs' success rates, but this approach would require defendant colleges to articulate and defend the reasons for the negative decision, and to make the information upon which the negative decision was based available to the plaintiff (DeLano, 1987).

Establishing an Appropriate Test of Qualification

It is difficult to disagree with the federal judges who maintain that "tenure is different," but the greater stakes

involved in a tenure decision do not necessarily argue for an approach that makes it virtually impossible for a disappointed tenure candidate to establish a prima facie case of employment discrimination. A few courts, in struggling with the need to recognize the importance of tenure on the one hand and the need to give plaintiffs a fair chance to establish their cases on the other, have opted for an approach that would require some evidence of subjective qualification, but would not require the plaintiff to prove the impossible--that the institutional decision-makers believed him or her qualified for tenure.

For example, the Second Circuit in Zahorik v. Cornell University (1984) suggested that a plaintiff might be able to establish a prima facie case if he or she could show

> that some significant portion of the departmental faculty, referrants or other scholars in the particular field hold a favorable view on the question (p. 94)

In other words, if the plaintiff could present evidence from appropriate individuals other than the plaintiff him- or herself that the plaintiff was at least arguably qualified for tenure, the burden would shift to the defendant college to demonstrate that such qualifications were insufficient under the institution's requirements. While this approach would probably result in a higher rate of plaintiff success at the prima facie case stage[8], it would not make more difficult the defendant college's task of demonstrating that the reason for tenure denial was nondiscriminatory. It recognizes that merely acquiring the appropriate academic degree and holding a teaching position for

the requisite number of years is insufficient to qualify a faculty member for tenure at most institutions. Furthermore, requiring some evidence of subjective qualification would discourage frivolous lawsuits, and does not place the judge in the position of substituting his or her judgment for that of the plaintiff's colleagues. And most importantly, this approach would provide a rationale for improved evaluation and employment decision-making processes within academic departments, for plaintiffs would have a greater incentive to obtain assessments of their performance before the ultimate tenure decision, and departmental decision-makers and administrators would have a similar stimulus for communicating with probationary faculty as to the standards of performance expected and the degree to which the faculty member has met those standards.

Implications for Faculty Employment Relations

The issues involved in the test for "qualification" at the prima facie stage have important implications for employment relations within academic departments. Departments spend a substantial amount of time and energy in recruiting faculty, and clearly the institution and the department have a strong interest in helping probationary faculty succeed. In addition to the obvious strategies of mentoring junior faculty, requiring minimal committee service, low student advising loads, and other approaches to freeing up the time of junior faculty to devote to activities that are considered important in attaining tenure, how can departments respond to the issues raised in the foregoing

discussion?

The academic discrimination cases offer much testimony as to the poor quality of policies, procedures, and general employment relations in some academic departments. The cases discuss examples of tenure reviews conducted without informing the candidate of the requirements for tenure (Johnson v. University of Pittsburgh, 1977), of tenure reviews completed entirely without the knowledge of the candidate that she was being reviewed for tenure at all (Smith v. University of North Carolina, 1980), of faculty who were not told that a terminal degree was necessary for a positive tenure decision (Kunda v. Muhlenberg Colleg, 1980), and of faculty who were not advised that their performance was unacceptable until after the negative decision was made (Lieberman v. Gant, 1980). The debate over what constitutes qualification at the prima facie case stage suggests that both candidates and their departments need to behave in a more systematic fashion to determine what the performance standards are for a positive tenure decision, to communicate those expectations to probationary faculty, and to keep such faculty apprised of their performance throughout the probationary period.

Department faculty should establish what constitutes "qualification" for tenure apart from consideration of a specific candidate's performance. This determination will have several advantages. First, it will be conducted in an atmosphere that is relatively objective and not biased by individual or group concerns about the degree to which a particular candidate will be

able to meet those criteria. Secondly, it will be difficult for a disappointed tenure candidate to allege that the rules were changed simultaneously with the negative tenure decision. And thirdly, courts give great deference to institutional performance standards; the more specific those standards are, the easier they are for the college to defend, and the more difficult it is for a plaintiff to allege that the standards were susceptible of varying interpretations.

Once the standards have been established, chairs should make certain that all probationary faculty understand them and the amount and quality of performance they require. Collegiality and the institution's legal interests would be served if probationary faculty participated in the development of these standards--again, it would be more difficult for a faculty member to challenge standards that he or she participated in setting, and it is more likely that probationary faculty will understand the significance of the standards if they have helped to develop them.

After the junior faculty have been apprised of the standards, they should be evaluated against those standards annually or semi-annually during their probationary period. Such a practice will eliminate the surprise involved in a tenure denial after six years of presumably acceptable performance; it will also discourage claims that the faculty member was not informed of performance problems and thus the decision must have been based upon discrimination (such as in the Lieberman case). These formal evaluations will build a record for both the

candidate and the department--a record that the candidate might wish to use in a subsequent discrimination lawsuit to demonstrate "qualification," or that the department might use to buttress its defense should a negative decision be challenged in court.

Adoption by the courts of the proposed approach to proving qualification would also suggest that probationary faculty should seek evaluations of their work from departmental colleagues and faculty from other institutions well in advance of the tenure decision. While such a practice is desirable from many standpoints (enhancing collegiality, giving researchers the benefit of critiques of their work prior to submission for publication), it could also serve as a source of proof for plaintiffs at the prima facie case stage of litigation. In other words, the policies adopted by federal courts for analyzing plaintiffs' qualifications for tenure could result in improved employment relations, enhanced collegiality, and better quality research as well as fairer judicial outcomes.

The national debate about quality in higher education has exacerbated the pressure caused by a limited job market in many academic disciplines to exert substantial pressure on institutions to make careful, appropriate tenure decisions, and on junior faculty to amass a record of performance that will be considered worthy of a positive tenure decision. Judicial responses to discrimination litigation have implications for the way in which promotion/tenure criteria are interpreted and applied by decision-makers, the manner in which probationary faculty are nurtured and evaluated, and the faculty member's own

strategy for building a record of high-quality performance.

NOTES

1. The effect of a plaintiff's success in demonstrating a prima facie case of employment discrimination is not dispositive of the case. It merely creates a presumption of discrimination, which the college can rebut by providing a neutral, non-discriminatory reason for the tenure denial. In fact, most plaintiffs who are able to establish prima facie cases of discrimination have still been defeated, as most trial and appellate judges accept the college's proffered reason of poor teaching, insufficient scholarship, or inadequate service (LaNoue and Lee, 1987).

2. Although tenure denials are litigated under other laws in addition to Title VII (for example, the Age Discrimination in Employment Act and state civil rights laws), the order of proof used in McDonnell-Douglas has been adapted by courts for use in cases litigated under other civil rights laws.

3. This burden is one of production of evidence only. The burden of persuasion (of establishing that discrimination did, in fact, occur) always remains with the plaintiff. The burden of producing evidence, however, shifts from plaintiff to defendant and back to plaintiff.

4. In U.S. Postal Service v. Aikens (1983), the U.S. Supreme Court was given the opportunity to decide whether a plaintiff need prove as part of his prima facie case that he was as well or better qualified for a position he sought than the individual who was selected. The Court averred that this was not the issue presented by the case, and refused to address it. However,

commentators have interpreted the Court's treatment of the case as a whole as an indication that proving relative qualification at the prima facie case stage is not necessary (Wikman, 1984, p. 475).

5. The Third Circuit's language in Kunda v. Muhlenberg College is illustrative. Judge Sloviter (a former faculty member at Temple University Law School) wrote:

> Congress did not intend that those institutions which employ persons who work primarily with their mental faculties should enjoy a different status under Title VII than those which employ persons who work primarily with their hands.
>
> (1980, p. 550)

6. Judge Friendly showed his hostility toward academic employment discrimination cases in general, and to Marcia Lieberman's claim in particular, in a footnote to the appellate opinion affirming the dismissal of her sex discrimination claim.

> We do not understand how either the federal courts or universities can operate if the many adverse tenure decisions against women or members of a minority group that must be made each year are regularly taken to court. .
>
> (p. 62)

7. A recently-completed study of academic discrimination cases found that, overall, plaintiffs were successful in only about 20 percent of the cases decided by federal courts on the merits, although plaintiffs won on procedural grounds more frequently (LaNoue and Lee, 1987, p. 31).

8. In Zahorik, the plaintiffs who presented evidence of

favorable recommendations by external peer reviewers were successful in making their prima facie cases, but the court ruled in the University's favor because it found the university's explanation for tenure denial to be reasonable. In Timper v. University of Wisconsin (1981), the trial judge ruled that the plaintiff had established a prima facie case because her department had voted 8-3 for tenure, but found the University's reason for tenure denial (change of direction in the department's curriculum, in which the plaintiff's specialty no longer fit) a reasonable basis for its decision.

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